SOUTHERN BANK BHD

v.

KAMARUDIN OTHMAN & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
WAN AFRAH IBRAHIM JC
[APPLICATION COURT NO: R2-25-97-2002]
29 OCTOBER 2004

ADMINISTRATIVE LAW: *Judicial review - Certiorari - To quash part of award handed down by Industrial Court - Setting aside dismissal and awarding monetary compensation - Whether Industrial Court could substitute its own view as to what was appropriate penalty - Failure to question whether it was reasonable for applicant to dismiss respondent - Whether an error of law - Whether award handed down unsustainable - Whether Industrial Court could invoke power of s. 30(5) Industrial Relations Act 1967*

LABOUR LAW: *Employment - Dismissal - Misconduct - Failure to comply with banking procedures - Appropriate penalty for employee's misconduct - Whether Industrial Court could substitute its own view as to what was appropriate penalty - Whether dismissal was reasonable - Whether award handed down unsustainable*

The first respondent was dismissed by the applicant for failing to comply with banking procedures which had caused a loss of RM100,000 to the bank. The Industrial Court ('second respondent') had upheld the applicant's finding that the first respondent committed misconduct. However, the second respondent decided that because there was an absence of deliberate or criminal intent on the part of the first respondent, the dismissal should be set aside and monetary compensation was awarded. Hence, the applicant applied for an order of *certiorari* to quash part of the award handed down by the Industrial Court. The issue that arose was whether the Industrial Court has the general power under s. 30 of the Industrial Relations Act 1967 to substitute the decision of the applicant.

Held (granting order in terms of motion with costs):

[1] The guidelines for the court with regard to the issue of intervention in the punishment is propounded in the judgment of *Tan Tek Seng v. Suruhanjaya Perkhidmatan & Anor*. The judge had specifically made reference to the Industrial Court when he said that it must not substitute its own view as to what was the appropriate penalty for the employee's

misconduct. Here, the Industrial Court had erroneously failed to ask the question whether or not it was reasonable for the applicant to dismiss the first respondent. Thus, the failure to ask itself the relevant question was patently an error of law and as such this award was unsustainable. (pp 387 f-h & 388 a-b)

[2] The Industrial Court could not invoke the power of s. 30(5) in the face of established principles of labour law governing the banking employment industry. By resorting to s. 30(5) to substitute the dismissal and award compensation without appreciating the principles in a case of misconduct involving a banking employee, the decision was tainted with illegality and should not stand. (p 388 c-d)

Case(s) referred to:

British Leyland UK Ltd v. Swift [1981] IRLR 91 ***(refd)***

Hotel Jayapuri Bhd v. National Union of Hotel Bar & Restaurant Workers & Anor [1980] 1 MLJ 109 ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama Serbaguna Sungai Gelugur [1999] 3 CLJ 65 FC ***(refd)***

Milan Auto Sdn Bhd v. Wong Sek Yen [1995] 4 CLJ 449 FC ***(refd)***

Nestle Food Storage (Sabah) Sdn Bhd v. Terrence Tan Nyang Yin [2002] I ILR 280 ***(refd)***

Ng Hock Cheng v. Pengarah Am Penjara & Ors [1998] 1 CLJ 405 FC ***(refd)***

R Bhadada v. The University of Jodhpur & Anor [1977] Lab IC 509 ***(refd)***

R Ramachandran v. Industrial Court of Malaysia [1997] 1 CLJ 147 FC ***(refd)***

Syarikat Kenderaan Melayu Kelantan v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***

Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA ***(refd)***

Viking Askim Sdn Bhd v. National Union of Employees in Companies Manufacturing Rubber Products & Anor [1991] 2 MLJ 115 ***(refd)***

Wong Yuan Hock v. Syarikat Hong Leong Assurance Sdn Bhd [1995] 2 MLJ 70 ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, ss. 20(3), 30(5)

For the applicant - Steven Thiru (Mazura Kamaludin with him); M/s Shook Lin & Bok

For the respondent - P Vickneswaran (Jacinta Johnson with him); M/s Murugavell Arumugam & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Wan Afrah Ibrahim JC:

This is an application made by the applicant for an order of *certiorari* to quash part of the Industrial Court Award no. 612 dated 18 July 2002 when the Industrial Court had set aside the dismissal of the first respondent by the applicant and awarded monetary compensation to him.

Grounds For Application

(1) the second respondent acted without jurisdiction and/or in excess of jurisdiction and erred in law when it decided that notwithstanding the first respondent's failure to comply with procedure (banking), he ought not to have been dismissed by the applicant;

(2) the second respondent acted without jurisdiction and/or exceeded its jurisdiction and committed an error of law when it held that because there was an absence of deliberate or criminal intent on the part of the first respondent, the dismissal should be set aside;

(3) the second respondent's decision to set aside the dismissal was a decision that was illegal and without power in as much as the second respondent had failed to properly appreciate and apply the relevant legal principles that govern misconduct due to non-compliance with procedures (banking);

(4) the second respondent erred in law and exceeded its jurisdiction when it relied on s. 30(5) of the Industrial Relations Act 1967 as the basis to ignore the ramifications of a misconduct due to non-compliance with procedures (banking);

(5) the second respondent's decision to set aside the dismissal was in all the circumstances a decision that no other person or tribunal similarly circumstanced would have arrived at. It was therefore a decision that was plainly irrational and/or unreasonable in the Wednesbury sense;

(6) the second respondent acted in excess of jurisdiction and/or without jurisdiction and erred in law when it decided to allow the first respondent monetary compensation in the manner it did;

(7) the second respondent's decision to award compensation to the first respondent in the form of arrears in salary, bonuses and increments for the period 28 August 1999 to 7 November 2001 (which is about 27 months) as well compensation in lieu of reinstatement (which is about six months), *albeit* with 50% reduction for contributory conduct, was illegal and without power or authority;

(8) the second respondent's decision to grant monetary compensation to the first respondent was in all the circumstances a decision that no other person or tribunal similarly circumstanced would have arrived at. It is accordingly a decision that is irrational and/or unreasonable in the Wednesbury sense.

Undisputed Facts

The applicant dismissed the first respondent after its domestic inquiry panel found that the first respondent had failed to comply with banking procedures in handling cash in transit and caused a loss of RM100,000 to the bank.

The Industrial Court had upheld the finding of the applicant that the first respondent had misconducted himself. The first respondent had not challenged that part of the decision of the Industrial Court.

The Industrial Court went on to order monetary compensation to the first respondent in the form of arrears in salary, bonuses and increments from the date of his termination to the last date of hearing and compensation in lieu of reinstatement with 50 percent reduction for contributory conduct.

Issue For Determination

Can the Industrial Court upon affirming an employer's finding that an employee had misconducted himself by breaching banking procedures, nevertheless interfered with the decision by the employer to dismiss the employee?

Judicial Review – Legal Principles

Before I proceed with the arguments put forward by both parties, I reminded myself of the legal principles in judicial review as enunciated in the case of *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama Serbaguna Sungai Gelugur* [1999] 3 CLJ 65, *Syarikat Kenderaan Melayu Kelantan v. Transport Workers Union* [1995] 2 CLJ 748 and *R Ramachandran v. Industrial Court of Malaysia* [1997] 1 CLJ 147.

Applicant's Arguments

Mr. Steven Thiru, counsel for the applicant submitted that the Industrial Court had interfered with the punishment imposed by the applicant on the first respondent as found in the following passage of the Award:

> Although there have been many instances where the Industrial Court has held that the misconducts pertaining to non-compliance of procedures must be seriously regarded and often justify dismissal, there can also be circumstances and surrounding facts which when taken into consideration will render dismissal unjustifiable. This is allowed since the Court is permitted to look into other

circumstances when arriving at a decision. This is provided for in subsection 30(5) of the Industrial Relations Act 1967 where it is stated that the Court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.

Counsel for the applicant submitted that from the above passage the Industrial Court had intervened with the applicant's decision not because the decision of the applicant was unreasonable, but merely relied on the general powers found in s. 30(5) IRA 1967. Reference was made by the applicant's counsel to the case of *Viking Askim* [1991] 2 MLJ 115 when Edgar Jospeh J made the following observation:

On the contrary, I am satisfied that the power of the Industrial Court to create new rights and obligations is derived from sub-ss (4), (5) and (5) of s. 30 of the Industrial Relations Act 1967 (reproduced above), though, it goes without saying, that this is a power which must be exercised reasonably and not arbitrarily.

As such, he argued that s. 30(5) cannot be utilised to create rights which are contrary to established principles namely, in cases of breach of procedures involving banking employee where the employer (bank) was entitled to dismiss the employee. In this case, the Industrial Court resorted to s. 30(5) to strike down the dismissal and award compensation without appreciating the well established principles in cases of misconduct involving banking employee. He therefore submitted that the decision cannot stand.

He further submitted that in order for an interference with the decision of the employer to dismiss the employee, the essential question the court must ask itself is: whether a reasonable employer would have dismissed the employee, on the facts of the case. Reference was made to the common law position in the case of *British Leyland UK Ltd v. Swift* [1981] IRLR 91 which held as follows:

... The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quiet reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him.

He submitted that the common law position was adopted by the Court of Appeal in the case of *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771 where NH Chan JCA (dissenting) postulated the following principle:

> The correct test was to determine whether it was reasonable for the appellant's employers to dismiss him on those facts. When considering the reasonableness of what a reasonable employer would have done, the Court (whether it be the High Court, Court of Appeal or, the Industrial Court) must not substitute its own views as to what was the appropriate penalty (for the employee's misconduct) for the view of the particular employer concerned.

Mr. Thiru reiterated that the said principle was subsequently approved by the Federal Court in the case of *Ng Hock Cheng v. Pengarah Am Penjara & Ors* [1998] 1 CLJ 405 where Peh Swee Chin FCJ held as follows:

> To repeat, a court intervenes only on the nature and manner of accusation against a public officer as distinct from a consequential punishment as explained above. Just like a professional body being the best tribunal to judge the seriousness of misconduct of the members, in a similar vein, an employer including a government, is the best person to judge similarly the seriousness of misconduct of an employee. Thus, we are of the opinion that on the narrow point in question, the majority judgment in *Tan Tek Seng* cannot stand though we express our agreement with the minority judgment on the same narrow point.

Based on the above judgment, Mr. Thiru pointed that the recognition by the Federal Court of the non-interference principle confirms the common law position in the *British Leyland*'s case as part of our law.

Wherein the present case, since the Industrial Court had not ask itself whether the decision of the applicant to dismiss the first respondent was reasonable on the facts of this case, counsel for the applicant claimed that the Industrial Court had flawed its process of reasoning. Hence the Industrial Court's decision to set aside the dismissal and award compensation cannot be sustained.

It was further argued that the Industrial Court compounded the error when it failed to heed to numerous other awards of the Industrial Court that have considerably held that a bank is a custodian of public fund and any breach of procedure by an employee would entitle the employer to dismiss the employee. Various awards pertaining to the same case were cited by the applicant's counsel. As such the inconsistent stand made by the Industrial Court in its Award in the present case is viewed as irrational or unreasonable in Wednesbury sense.

Turning to another ground of application, it was submitted that the Industrial Court exceeded its jurisdiction when it held as follows:

> From the facts found in the case, it is noted that there is no element of deliberate or criminal intention when the Claimant breached the three procedures.

Counsel for the applicant argued that there is no requirement in law that the employer must establish criminal intention before it may dismiss an employee for misconduct. As such, he submitted it is unreasonable on the part of the Industrial Court to impose this requirement on the applicant. Reference was made to the case of *R Bhadada v. The University of Jodhpur and Another* [1977] Lab. IC 509.

On the matter pertaining to compensation, counsel submitted that it is an established principle that when a dismissal is struck down the employee is entitled to one of the following remedies ie, reimbursement with payment of arrears, salary, bonuses and increments from date of dismissal to the last date of hearing or backwages up to 24 months of the last drawn salary together with compensation in lieu of reinstatement of one month's salary. Reference was made to, *Nestle Food Storage (Sabah) Sdn Bhd v. Terrence Tan Nyang Yin* [2002] I ILR 280.

In this case, counsel argued that the Industrial Court had committed an error of law in granting the relief in the manner that it did which is a mixture of two established exclusive remedies.

First Respondent's Arguments

Mr. P. Vickneswaran counsel for the first respondent, related that the proceedings before the Industrial Court arose out of the reference under s. 20(3) of the IRA over the dismissal of the first respondent. He submitted that the Industrial Court must consider, not only whether the misconduct complained of was committed, but also if the workman did so commit the misconduct and whether such misconduct constitute just cause or excuse to dismiss the workman, or in other words, whether the punishment of dismissal was justified based on the circumstances of the case.

Reference was made to the case of *Milan Auto Sdn Bhd v. Wong Sek Yen* [1995] 4 CLJ 449 and *Wong Yuan Hock v. Syarikat Hong Leong Assurance Sdn Bhd* [1995] 2 MLJ 70.

Counsel for the first respondent submitted that in this case, the Industrial Court, after a careful evaluation of the evidence was correct to come to a conclusion that the punishment of dismissal was too harsh. He further submitted that the Industrial Court had correctly interfered with the disciplinary action taken by the applicant.

As to the test enunciated in *British Leyland*'s case promoted by the applicant, the first respondent argued that the test is not applicable. In contrast the principle in *Wong Yuen Hock* and *Milan Auto (supra)* applies where the court states, the function of the Industrial Court is not only to consider whether the misconduct complained of was committed, but also if the misconduct was committed and proven; whether the misconduct constitute just cause or excuse for the dismissal.

He submitted the Industrial Court has the power to decide that the punishment of dismissal was too harsh in the circumstances. The provision of s. 30(5) of the Industrial Relations Act 1967 permits the Industrial Court to look into all relevant factors and arrive at the conclusion that the dismissal was too harsh in the circumstances. Thus, the test is, whether in equity and good conscience, the proven misconduct warrants dismissal upon the peculiar resolution of facts and not just confine to the fact whether a reasonable employer would have dismissed the employee based on the facts of the case.

In relation to the Court of Appeal decision in *Tan Teck Seng* and the Federal Court decision in *Ng Hock Cheng v. Pengarah Am Penjara*, counsel for the first respondent submitted that the two authorities relied upon by the applicant were misplaced. He argued that the two authorities relied on, originated from a dismissal suit brought against public sectors where it has its own rules and regulations, whereas, the facts in the present case relates to employment in the private sector which is governed entirely by a different set of laws and principles.

As to the arguments put forward that the Industrial Court failed to heed to the other numerous awards, counsel argued that there were other awards that had been decided despite the finding that the misconduct was proven, the dismissal of the workman was without just cause or excuse. Reference was made to Industrial Court case of *Goodyear Malaysia Bhd v. National Union of Employee in Companies Manufacturing Rubber Products* and *Chartered Bank v. National Union Bank of Employee.*

Pertaining to compensation awarded, counsel for the first respondent pointed that the Federal Court in the case of *Hotel Jayapuri Bhd v. National Union of Hotel Bar & Restaurant Workers & Anor* [1980] 1 MLJ 109 held that if there is a legal basis for an award of backwages, the amount is very much a matter of discretion which the Industrial Court is fully empowered to make under s. 30 of the Industrial Relations Act 1967.

The Decision

I refer to the issue for determination before me. It is obvious that the two parties had conflicting views as to the correct test to apply in this particular case.

The first respondent had submitted two major principles in his written submission ie: (1) If the misconduct was committed and proven, whether the misconduct constitute just cause or excuse for the dismissal and in this instance he relied on the case of *Milan Auto Sdn Bhd v. Wong Sek Yen* [1995] 4 CLJ 449. (2) The Industrial Court has the general power under s. 30(5) IRA 1976 to substitute the decision of the applicant.

It is to be noted that principle (1) was never addressed to the Industrial Court nor was it commented and considered by the Industrial Court in its Award. In fact the Industrial Court primarily invoke s. 30(5) namely; the court shall act according to equity and good conscience, and the substantial merits of the case without regard to technicalities and legal form to substitute the decision of the applicant as such I am inclined to disregard principle (1) as promoted by the counsel for the first respondent in the court herein.

With regard to principle (2), I shall discuss it at a later stage.

I now turn to the issue for determination before me. I am inclined to agree with the counsel for the applicant that the test as envisaged in the *British Leyland*'s case ought to be applied in determining whether the Industrial Court could intervene with the punishment imposed by the employer. In other words, the Industrial Court had to ask itself the question as to whether the decision of the applicant to dismiss the first respondent was reasonable on the facts of the case.

I am also agreeable that the guidelines for the court with regard to the issue of intervention in the punishment was as propounded in the dissenting judgment of NH Chan JCA in the case of *Tan Tek Seng v. Suruhanjaya Perkhidmatan & Anor*. It is obvious to me that, this narrow point on the test for punishment was approved by the Federal Court in *Ng Hock Cheng v. Pengarah Am Penjara & Ors*. Nonetheless, I concede that the facts of *Tan Tek Seng*'s case concerns the intervention of the High Court in respect of punishment of a public servant. However, it is pertinent to note that NH Chan JCA specifically made reference to the Industrial Court when he said "Industrial Court must not substitute its own view as to what was the appropriate penalty for the employee's misconduct." In fact, the learned judge granted with approval the dicta of Lord Denning MR in the *British Leyland*'s case.

In this case, though these relevant authorities were cited to the Industrial Court, it is obvious to me that the Industrial Court failed to take into consideration the correct test to be applied.

In retrospect, it is clear from the Award that the Industrial Court erroneously failed to ask this question before it, *viz*; whether or not it was reasonable for the applicant to dismiss the first respondent. To my mind, the failure of the Industrial Court to ask itself the relevant question was patently an error of law and as such the award is not sustainable.

I now refer to principle (2) submitted by counsel for first respondent, that the Industrial Court has the power under s. 30(5) of the IRA 1967 to substitute the decision of the applicant. I concede that the Industrial Court has the general power under s. 30(5) to create new right and obligation.

However I must indeed stress that this is a power which must be exercised reasonably and not arbitrarily. In short, the Industrial Court cannot invoke the power of s. 30(5), in the face of established principles of labour law governing the banking employment industry.

By resorting to s. 30(5) to substitute the dismissal and award compensation without appreciating the principles in case of misconduct involving banking employee is tainted with illegality and cannot stand.

As to the grounds relating to the compensation awarded by the Industrial Court, I am of the opinion that the amount awarded (if he is entitled to) is more of the discretion of the Industrial Court which I do not intent to interfere for now it becomes academic.

In conclusion, under the circumstances above, I grant an order in terms of this motion with costs.